Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1527

ROBERT L. CHESNEY,

Petitioner,

vs.

STATE CONTROLLER, STATE OF CALIFORNIA, COUNTY OF MERCED, LYNN GRESHAM as TAX COLLECTOR OF THE COUNTY OF MERCED, AND DAVID R. HUDGINS as ASSESSOR OF THE COUNTY OF MERCED,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FIFTH APPELLATE DISTRICT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL FIFTH APPELLATE DISTRICT

The Petitioner Robert L. Chesney respectfully prays that a writ of certiorari issue to review the judgment by the California Court of Appeal, Fifth Appellate District which affirmed the judgment for summary judgment against

Petitioner in the trial court entered on January 28, 1976.

OPINION BELOW

A copy of the opinion filed on November 23, 1976, in the Court of Appeal, Fifth Appellate District is attached hereto as Appendix "A." The California Supreme Court entered an order on February 3, 1977, denying a petition for hearing, without writing an opinion.

JURISDICTION

The order of the California Supreme Court denying the Petition for hearing was entered on February 3, 1977. The petition for certiorari herein was filed within 90 days of this date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether the requirements of due process of law, notice and hearing have been met by the procedures of the California taxing authority in the taking of Petitioner's real property.

2. Whether owner's acquisition of real property, knowledge of real property taxes falling due and the possible loss of the real property for the failure to pay taxes is a substitute for the due process of notice and hearing.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the Constitution is set forth in Appendix "B."

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Revenue and Taxation Code are set forth in Appendix "C."

STATEMENT OF THE CASE

In 1965 Petitioner purchased Lot 168 of the Delhi State Land Settlement in Merced County. All notices and tax bills were sent to his address at 9867 Wheatland, Sunland, California.

This Wheatland address has been Petitioner's permanent mailing address for more than thirty years.

In 1966 Petitioner purchased adjoining Lot 170 and the deed showed a return address of 427 West Palmer, Glendale, California, which was Petitioner's business address at the time.

A portion of Lot 169 was purchased at about the same time in the name of Emma Robbins, the wife of Petitioner, and her address is 11214 Merced Avenue, Turlock, California 95380.

All three said lots adjoined each other as part of the same farm parcel.

In early 1968 Petitioner moved his business from 427 West Palmer Avenue, Glendale, California; and he never, prior to the final sale, received any of the tax bills or notices with regard to Lot 170.

As to Lot 168, he received tax bills and notices at his correct address, as did Emma Robbins, with regard to Lot 169.

On October 9, 1970, Petitioner had orally notified the Assessor's office of his correct address for Lot 170. The Assessor's office records did not reflect such notification or change of address, and it continued to mail tax bills and other notices to the old Palmer Street address.

County taxes for 1967-68 on Lot 170 were not paid, and the lot was sold to the State, and taxes remained delinquent for five years. On July 3, 1973, Lot 170 was deeded to the State.

On October 29, 1973, Lot 170 was sold by the State to a Mr. Hovannisian for $9,600.00 plus $11.00 costs. At the time of the last sale, delinquent taxes and penalty amounted to $2,468.43.

Petitioner did not learn of the impending sale until Thursday, October 25, 1973, or Friday, October 26, 1973, when persons unknown to him came to Lot 170 to inspect the property in contemplation of submitting a bid. On October 26, 1973, Petitioner went to the Tax Collector's office and offered $500.00 in partial payment of the taxes. This was refused. About two weeks later he went to the office prepared to pay the whole amount of the delinquency, which offer was refused.

When Petitioner purchased the property, he took subject to a first deed a trust loan in the sum of about $4,700.00, and at the time of the sale to Mr. Hovannisian the balance was about the same. No notices of any kind were sent to the beneficiary of the deed of trust by the Assessor or Tax Collector.

Acquisition and improvement of the property cost Petitioner about $70,000.00. The fair market value of the real property at the time of the sale to Mr. Hovannisian was the sum of at least $25,000.00.

STATEMENT OF FACTS

On January 27, 1975, Petitioner commenced a civil action in the Superior Court of Merced County, State of California by filing a First and then a Second Amended Complaint to set aside a tax sale of real property and conveyance to the State of California. The Second Amended Complaint also sought damages.

In Petitioner's Second Amended Complaint, he alleged the denial of due process because he was not given notice of the conveyance and subsequent sale of the real property either by mail, in person or otherwise (C. T. pp. 7, 8). The Petitioner further alleged that defendants had knowledge of his true and correct address, but still did not give him notice of the sale which conduct was in violation of the 14th Amendment of the Constitution of the United States (C. T. 8).

All defendants answered Petitioner's Complaint and began conducting discovery by way of interrogatories.

On December 23, 1975, defendants filed their motion for summary judgment (C. T. 76) on the ground that Petitioner's lack of due process was without legal merit (C. T. 78). Defendants alleged that the due process requirement was met by their compliance with the notice requirement of Revenue and Taxation Code Sections 3365 and 3701 (C. T. 80).

On January 16, 1976, Petitioner filed his response to defendants' motion for summary judgment again raising the issue of denial of due process. Petitioner cited the case of Mullane v. Central Hanover Bank & Trust Co. (1950) 339 U.S. 306 in support of his argument that the notice requirement of Revenue and Taxation Code Sections 3365 and 3701 violate the due process clause of the 14th Amendment of the Constitution of the United States. The Court in Mullane said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finalty is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . ."

On January 26, 1976, the motion came on for a hearing in Department 1 of the Merced County Superior Court before the Honorable Donald R. Fretz and arguments were had thereon. At the conclusions of said arguments Judge Fretz issued his ruling in which he granted defendants' motion for summary judgment and dismissed Petitioner's Second Amended Complaint. The judgment of summary judgment was entered on January 28, 1976.

Thereafter, on February 9, 1976, Petitioner filed a Notice of Appeal and Notice to Prepare Record and Transcript. Defendants, on February 18, 1976, filed a Notice of

Designating Additions to the Clerk's Transcript on Appeal.

Petitioner's Opening Brief was filed on May 12, 1976. In his brief, Petitioner argued that he had been denied due process in violation of the 14th Amendment because the notice requirement as set forth in the statutory provisions was not adequate (OB p. 7). Thereafter, Respondents filed their brief and Petitioner then filed his Reply Brief.

On November 23, 1976, the Court of Appeal filed its opinion affirming the trial court's judgment of summary judgment. In its opinion, the Appellate Court responded to Petitioner's allegation of lack of due process by stating that direct mail notice was not necessary to satisfy Petitioner's right to constitutional due process (Appendix A-9). If further stated that publication of notice is all the due process to which the delinquent taxpayer is entitled (Appendix A-11).

On December 30, 1976, Petitioner filed a Petition for Hearing in the California Supreme Court and on February 4, 1977, the California Supreme Court entered an order denying the petition without opinion.

REASONS FOR GRANTING THE WRIT

POINT I

REQUIREMENT OF DUE PROCESS OF LAW, NOTICE AND HEARING IS NOT MET BY THE STATUTORY PROCEDURES USED BY THE STATE OF CALIFORNIA TAXING AUTHORITY IN THE TAKING OF REAL PROPERTY AND THEREFORE SUCH FAILURE RAISES A SUBSTANTIAL FEDERAL QUESTION.

Petitioner contends that the action of the trial court in granting defendants' motion for summary judgment raises a substantial federal question in that Petitioner's Second Amended Complaint did raise and allege a material triable issue of Petitioner's lack of due process in the taking of his property by the State of California. Petitioner alleged in his Second Amended Complaint and again in his response to defendants' motion for summary judgment that he was not given actual notice of the taxing authority's intention to deed his property to the State of California for unpaid taxes even though the said taxing authority had his correct address on its assessment roll.

California's Revenue and Taxation Code Sections 2609 to 3711 set forth procedures by

which the County and State may take and sell real property for delinquent taxes:

A. Publication of a notice. Section 2609-11.

B. Later bills shall state a sale for taxes. Section 2612.

C. Publication for annual delinquent list. Section 3351.

D. After a lapse of five years, a notice of intent to deed the property to the State is to be sent to the last assessee at his last known address. Section 3365.

E. The notice of intended sale is to be sent by registered mail to the last assessee at his last known address. Section 3701.

In 1971 and 1972 the California legislature amended Sections 3365 and 3701 of the Revenue and Taxation Code as follows:

> "The tax collector shall make a reasonable effort to ascertain the address of the last assessee of the tax-sold property, including but not limited to. . . an examination of the most recent telephone books in the county in which the tax-sold property is located, and an examination of the telephone book covering the area of the last known address of the assessee.

"The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the deed to the state."

The effect of these amendments is to allow the taxing authority to give notice of intended conveyances and sales by publication alone even though the correct address of the assessee is known.

In this particular case, the taxing authority failed to send its notices of intent to deed Petitioner's real property to the state to Petitioner's last known address, even though this address was within their knowledge.

The leading case in the area of notice as a due process requirement is Mullane v. Central Hanover Bank & Trust Co. (1950) 399 U.S. 306.

This case involved a trust company which gave notice to beneficiaries of 113 trusts which were to be consolidated by the trustees under a New York Banking law. The notice was merely published in a New York newspaper even though names and addresses of some of the beneficiaries were known to the trustees.

The court held that the notice by publication was inadequate because it was not reasonably calculated to reach those who could easily be informed by other means at hand.

The Mullane court further stated on the subject of due process as follows:

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances to apprise interested parties of the pendence of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457; Grannis v. Ordean, 234 U.S. 385; Priest v. Las Vegas, 232 U.S. 604; Roller v. Holly, 176 U.S. 398. The notice must be of such nature as reasonably to convey the required information, Grannis v. Ordean, supra, and it must afford a reasonable time for those interested to make their appearance, Roller v. Holly, supra, and cf. Goodrich v. Ferris, 214 U.S. 71. But if with due regard for the practicalities and pecularities of the case these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' American Land Co. v. Zeiss, 219 U.S. 47, 67; and see Blinn v. Nelson 222 U.S. 1, 7.

"But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare Hess v. Pawloski, 274 U.S. 352, with Wuchter v. Pizzutti, 276 U.S. 13, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

"It would be idle to pretend that publication alone, as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of

> the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when, as here, the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice, we are unable to regard this as more than a feint." Id. p. 314-315.

The general rule that may be drawn from the Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertained and whose legally protected interests are directly affected by the proceeding in question. The statutory published notice is, therefore, incompatible with the requirement of the Fourteenth Amendment.

This general rule is not incomprehensible since common sense and experience tells us that published notice does not give notice.

In the California Appellate case of Johnson v. Alma Inv. Co., 47 Cal. App. 3d 155 the court found that appellants were deprived of their property without due process of law because they did not receive adequate notice of the special assessment against their property notwithstanding publication of the notice of assessment as authorized by the statute.

The facts were as follows:

The appellants owned two lots in the assessment area. The assessment roll listed the correct Palo Alto address for one of Appellants' lot, but not for the other.

Appellants received, through the mail, notice of the assessment on one lot which they paid. No notice of the assessment on the other lot was mailed to appellants; but notice of the assessment was published in the newspapers as authorized by statute.

These facts are similar to the situation in the present case. Petitioner was the owner of two adjoining lots. The tax rolls listed petitioner's correct address for Lot 168, but an incorrect address for Lot 170. Tax bills and notices were mailed to him for Lot 168. No notices were mailed to him for Lot 170, but notice of the conveyance and subsequent sale of Lot 170 was published in the local newspaper as authorized by statute. Following the ruling in the Johnson case, petitioner herein was deprived of his property without due process of law because petitioner did not receive adequate notice of the taking of his property by the State notwithstanding publication of the notice.

In the California case of Philbrick v. Huff, 60 Cal. App. 3d 633, the court held:

> "It is, of course, well established principle that a person's property may not be taken from him

without due process of law and that a fundamental requisite of due process is notice, reasonably calculated under all circumstances, to apprise the interested parties of the pendency of proceedings which could result in a deprivation of a person's property so as to afford him an opportunity to be heard."

In an Arizona Appellate case, Johnson v. Mock, 19 Ariz. App. 283 (1973) the court found lack of due process in the procedures used by the taxing authority in taking real property for unpaid taxes.

The case involved the following facts:

The original owners of a piece of real property sold it to a buyer who later defaulted The buyer quitclaimed the property back to the Mocks. However, the taxing authority was not notified. All tax bills and delinquent tax notices were sent to the buyer who defaulted. The notice of intent to deed the property to the state was sent by registered mail to the default buyer. The Mocks received no actual notice and brought an action for quiet title. The Appellate Court found for the Mocks because their address was readily available from the recorded quitclaim deed.

Due process requires inquiry as to whether the procedure used by the taxing authorits is that which truly gives notice and affords an interested party an opportunity to be heard.

The court in Mullane stated that a state must give a person notice and the opportunity to be heard before it can deprive that person of his property.

Publication alone may be acceptable under the Mullane reasoning if it is "not reasonably possible or practicable to give more adequate warning." However, where the name and address is available, the reasons disappear to resort to publication which is less likely than the mails to apprise an interested party of an action to deprive him of his property.

Due process is an affirmative requirement which any governmental agency must meet before it can take away a person's property.

> "The right of property is a fundamental, natural, inherent and inalienable right."
> Miller v. McKenna, 23 Cal. 2d 774.

The Supreme Court cases have held that due process was not satisfied by publishing and posting notice of sale on condemned land in a condemnation proceeding. Schroeder v. City of New York, 371 U.S. 208; Walker v. City of Hutchinson, 352 U.S. 112.

Pursuant to California Revenue and Taxation Code Section 3807, the right to redeem one's property is not terminated until "the date upon which the application for the deed is received or on the date upon which the payment of the purchase price is received in compliance with the

terms of the agreement."

At the time the tax collector published notice under Revenue and Taxation Code Section 3365 of his intent to deed Petitioner's property to the State of California, the Petitioner still owned the property in question and still had a statutory right to redeem his property by paying the delinquent taxes.

The Mullane due process requirement is that notice be reasonably calculated to apprise "interested parties" of the pendency action.

In Fuentes v. Shevin, 407 U.S. 67, the court stated that:

> "The Fourteenth Amendment's protection of 'property' . . . has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to any significant property interest, including statutory entitlements."
> Id., at p. 87.

Since Petitioner was an "interested person" at the time notice was given by the taxing authority under Revenue and Taxation Code Section 3365 of its intent to deed Petitioner's property to the state, Petitioner had the constitutional right to receive the kind of notice that Mullane demands.

POINT II

OWNER'S ACQUISITION OF REAL PROPERTY, KNOWLEDGE OF TAXES FALLING DUE AND THE POSSIBLE LOSS OF THE REAL PROPERTY FOR FAILURE TO PAY TAXES IS NOT A SUBSTITUTE FOR THE DUE PROCESS OF NOTICE AND HEARING.

The fact that petitioner knew that if he did not pay his real property taxes on his property he faced the possible loss of his property is not a substitution for due process. Petitioner relied on his right to have actual notice before any taking of his property by the state and the opportunity to be heard.

The Mullane case requires personal notice despite knowledge by the individual that property may be effected:

> "The trustee has on its books the names and addresses of the income beneficiaries represented by appellant, and we find no tenable ground for dispensing with a serious effort to inform them personally of the accounting, at least by ordinary mail to the record addresses. Cf. Wuchter v. Pizzutti, supra. Certainly sending them a copy of the statute months and perhaps years in advance does not

answer this purpose. The trustee periodically remits their income to them, and we think that they might reasonably expect that with or apart from their remittances word might come to them personally that steps were being taken affecting their interests." Id., p. 318.

Any tax sale procedure is based upon a determination that the taxes were in fact not paid. This determination is usually in the first instance an administrative decision made by a tax official. The requirement of due process arises because these tax officials can and do make mistakes. See Ponder v. Ekey (1944) 152 P.2d 268 and Rogers v. Dent (1922) 239 S.W. 1074.

The determination that the taxes have not been paid cannot be assumed and acted upon until the owner is notified of this determination and given an opportunity to challenge it.

In its opinion the California Court of Appeal, Fifth District, stated that "(A) long line of California cases has held in tax sale situations publication of notice is all the 'due process' notice to which a delinquent taxpayer is entitled (p. A-11)." The court seems to be saying that a delinquent taxpayer has less of a right to due process than other taxpayers. Such a position is clearly in violation of the due process clause of the Fourteenth Amendment!

"A wrongdoer is not entitled to less notice than others." Robinson v. Hanrahan, 409 U.S. 38 (1972).

The due process clause of the Fourteenth Amendment must be equally applied to all persons whether they are believed to be wrongdoers or not. There can be no substitution for due process.

It should be noted in the present case that the State of California sold Petitioner's property for $9,600.00 when the taxes and penalties due on said property were only $2,468.43. The State obtained a substantial profit from the transaction. Petitioner was deprived of his property without just compensation. It is Petitioner's position that the State should not be allowed to make a profit from not notifying Petitioner of the sale when the State had his address from the tax rolls on an adjoining parcel.

CONCLUSION

Petitioner submits that the facts specifically pleaded in the Second Amended Complaint clearly establish that Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution because he was

not given actual notice of the taxing authorities' intent to deed his property to the State of California.

The Writ of Certiorari should be granted as prayed for.

DATED: May 3, 1977.

Respectfully submitted,

GARY M. CRANE

Attorney for Petitioner

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

ROBERT L. CHESNEY,	)	
	)	
Plaintiff and Appellant,	)	5 Civil No. 2903 (Sup. Ct. No. 48331)
	)	
v.	)	OPINION
	)	
LYNN GRESHAM, as Tax Collector, etc., et al.,	)	
	)	
Defendants and Respondents.	)	
	)	

APPEAL from a summary judgment entered by the Superior Court of Merced County. Donald R. Fretz, Judge. Affirmed.

Gilbert Moody and Vernon Johnson for Plaintiff and Appellant.

Evelle J. Younger, Attorney General, Charles C. Kobayashi, Deputy Attorney General, Russell M. Koch, County Counsel, and Blair H. Checketts, Deputy County Counsel, for Defendants and Respondents.

Plaintiff and appellant, Robert L. Chesney filed this action against the State of California,

the County of Merced, Lynn Gresham, as Tax Collector of the County of Merced, David R. Hudgins as Assessor of the County of Merced, and John Hovannisian to set aside a tax sale and deed to the State of California and a subsequent sale and deed of the property to Hovannisian, and in the alternative for damages. The trial court granted the motion for summary judgment (Code Civ. Proc., § 437c) of the defendants State Controller, State of California, County of Merced, and David R. Hudgins as Assessor of the County of Merced. 1/ Chesney has appealed from the summary judgment.

There is little conflict in the facts. However, since this is an appeal from a summary judgment, where such conflict appears in the papers submitted in support of and in opposition to the motion, we resolve those conflicts in favor of the nonmoving party (appellant herein).

Appellant purchased and obtained title to Lot 170 of the Delhi State Land Development subdivision in Merced County in February 1966, that lot being the subject of this action. He has also owned Lot 168 in the same subdivision since 1965. Contemporaneously with the purchase of Lot 170, appellant purchased Lot 169 adjoining Lot 170 and put it in the name of Emma Robbins, whom appellant married in December 1974. He

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1/ Defendant John Hovannisian did not join in the motion for summary judgment and is not a party to this appeal.

has lived on Lot 169 since September 1, 1973.

At the time of the purchase of Lot 170 the assessor's office records reflected appellant's address as 427 West Palmer, Glendale, California. In early 1968 appellant moved his business from 427 West Palmer Avenue and he has never received any of the tax bills or notices with regard to Lot 170 since that date.

As to Lot 168, he received tax bills and notices at his correct address, as did Emma Robbins with regard to Lot 169.

On October 9, 1970, appellant orally notified the assessor's office of his correct address for Lot 170. The assessor's office records did not reflect such notification or change of address, and since their records continued to reflect the 427 West Palmer Street address for Lot 170 they continued to mail the tax bills and other notices to that address.

The county ad valorem taxes for the fiscal year 1967-1968 on Lot 170 were not paid, and after proper publication of notice (Rev. & Tax. Code,[2/] §§ 3351, 3436) Lot 170 was sold to the state. The taxes remained delinquent for five years after the sale, and in accordance with statutory provisions Lot 170 was deeded to the

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2/ All references to code sections herein will be to the Revenue and Taxation Code unless otherwise indicated.

state on July 3, 1973. (§§ 3361, 3365, 3517, 3518.) On October 29, 1973, Lot 170 was sold by the state at public auction to defendant Hovannisian for $9,600 plus $11 costs and was subsequently deeded to him. At the time of the sale the delinquent taxes and penalty on the property were in the amount of $2,468.43.

Prior to the deed to the state a notice of intended deed to the state was published pursuant to section 3361. The tax collector also sent a registered mail notice of the intent to deed to the state pursuant to section 3365.[3/] When this

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3/ Section 3365 provides:

"After the first publication of the notice of intent to deed to the state and not less than 21 nor more than 35 days before the date of deeding, when tax-sold property is to be deeded, the tax collector shall send by registered mail to the last assessee of the tax-sold property at his last known address either a copy of the publication or a notice of intent to deed the property to the state. The tax collector shall make a reasonable effort to ascertain the address of the last assessee of the tax-sold property, including, but not limited to, an examination of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll, an examination of the most recent

(cont. p. A-5)

notice was returned as undeliverable the tax collector checked through the records of the assessor's office for a better address but could find none.

Before the public auction resulting in the sale to respondent Hovannisian, in addition to the publication of notice thereof as required by section 3702, 4/ the tax collector again sent

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3/ (cont. from p. A-4)

telephone books in the county in which the tax-sold property is located, and an examination of the telephone book covering the area of the last known address of the last assessee.

"The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the deed to the state."

4/ Section 3702 provides:

"The tax collector shall publish the notice of intended sale once a week for three successive weeks in a newspaper of general circulation published in the county seat and in a newspaper of general circulation published in the judicial district in which the property is situated. If the same newspaper of general circulation is published in both the

(cont. p. A-6)

registered mail notices of the sale of tax deeded property to occur at public auction on October 29, 1973. These notices were returned, and although the tax collector checked through the records of the assessor's office he could find no better address. Though not required by statute, on September 13, 1973, the tax collector also sent a notice of the intent to sell Lot 170 on October 29, 1973, to all adjoining lot owners. One of those was sent to Emma Robbins, who was listed as owner of Lot 169.

Appellant actually learned of the impending sale on Thursday, October 25, 1973, or Friday, October 26, 1973, when persons unknown to him came to Lot 170 to inspect the property in contemplation of submitting a bid thereon.

4/ (cont. from p. A-5)

county seat and in such district, or if the publication of the notice of sale is made in a newspaper which is determined pursuant to Section 3381 as most likely to afford adequate notice of the sale, publication in such paper shall satisfy the requirements for publication set forth in this section. If there is no newspaper published in the county seat or in the judicial district, then publication may be made by posting notice in three public places in the county seat or in the judicial district, as the case may be, where no such newspaper is published. The publication shall be started not less than 21 days prior to the sale."

Approximately two weeks following the sale appellant attempted to pay the obligation on Lot 170 in full to the tax collector, and it was properly refused. (§ 3707; Mercury Herald Co. v. Moore (1943) 22 Cal. 2d 269, 273.)

During his lifetime appellant had owned approximately 10 different parcels of real property in California, was aware of the annual tax assessments and knew that the taxes on Lot 170 had not been paid since he purchased the lot in 1966. This fact did not concern him because he believed the property could not be sold without actual notice to him.

Two other statutory provisions have particular relevance to the issues herein. With regard to the deed to the state, section 3518 provides:

> "The deed, duly acknowledged or proved, is conclusive evidence, except against actual fraud, of the regularity of all other proceedings from the assessment of the assessor to the execution of the deed, both inclusive."

Relative to the effect of the deed to the purchaser at the public auction, section 3711 provides:

> "Except as against actual fraud, the deed duly acknowledged or proved is conslusive evidence of the regularity of all proceedings from the assessment of the assessor

the execution of the deed, both inclusive."

The nuclei of appellant's contentions are that (1) the tax collector did not comply with the requirements of sections 3365 and 3701 because the registered mail notice was not sent to appellant's correct address which the assessor had been told about, (2) because appellant was the owner of an adjacent lot, No. 168, and the correct address appeared as to that lot, the tax collector must not have made a reasonable effort to ascertain his last address,[5/] and (3) the validating provisions in the last paragraph of sections 3365 and 3701 and those contained in sections 3518 and 3711 are invalid as being a violation of due process inasmuch as they purport to authorize the sale of Lot 170 without actual notice to the owner, in violation of the owner's constitutional due process rights.

We start with the last point first since if the requirement of notice by registered mail "could have been omitted by the legislative body in the first place, then a failure to comply with it is not jurisdictional. . . ." (McMaster v.

5/ In this connection it must be noted that these sections literally require the search of the assessor's records only with regard to "this property," not all property or lots on the rolls of the assessor, the latter obviously being a burden beyond the resources of the assessor.

City of Santa Rosa (1972) 27 Cal. App. 3d 598, 603.) To elaborate, sections 3518, 3711, 3365 and 3701 cannot cure a jurisdictional defect, that is, one which is a constitutionally indispensable step. (Miller v. McKenna (1944) 23 Cal. 2d 774, 782; Ramish v. Hartwell (1899) 126 Cal. 443, 449; Philbrick v. Huff (1976) 60 Cal. App. 3d 633, 641.) Alternatively, those sections do cure a nonjurisdictional defect. (Philbrick v. Huff, supra, 60 Cal. App. 3d 633, 640; Nutting v. Herman Timber Co. (1963) 214 Cal. App. 2d 650, 656; Bell v. Towns (1949) 95 Cal. App. 2d 398, 400-401.) Thus, Philbrick v. Huff, supra, 60 Cal. App. 3d 633, 640, citing Nutting v. Herman Timber Co., supra, 214 Cal. App. 2d 650, 656, states: "A defect in a tax proceeding is not jurisdictional where it 'has been for nonobservance of some procedural notice or other step which the Legislature, without defiance of state or federal Constitution, might have dispensed with altogether.'" (See also Paul v. Los Angeles County Flood Control Dist. (1974) 37 Cal. App. 3x 265, 273-275.)

Thus, in determining whether or not failure of respondent to send tax bills and notices of delinquency to appellant's proper address is jurisdictional, it must be determined whether direct mail notice is necessary to satisfy appellant's rights to constitutional due process.

> "It is, of course, a well-established principle that a person's property may not be taken from him without due process of law and that

> a fundamental requisite of due process is notice, reasonably calculated, under all the circumstances to apprise the interested parties of the pendency of proceedings which could result in a deprivation of a person's property so as to afford him an opportunity to be heard. [Citations.]"
> (Philbrick v. Huff, supra, 60 Cal. App. 3d 633, 641.)

In the seminal case of Mullane v. Central Hanover Tr. Co. (1950) 339 U.S. 306, 315 [70 S.Ct. 652, 657], the United States Supreme Court concluded:

> "The means employed [to give notice to interested parties] must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected. . . ."

In Mullane, the court held mere publication of notice to the beneficiaries of a trust fund whose names and addresses appeared on the trustee's books was insufficient to satisfy due process. As to those beneficiaries, the

trustee was required to provide notice by mail. (Mullane v. Central Hanover Tr. Co., supra, 339 U.S. at p. 318.)

The case makes clear, however, that actual notice need not be shown to satisfy the requirements of due process. It states:

> "The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably claculated to reach those who could easily be informed by other means at hand."
> (Mullane v. Central Hanover Tr. Co., supra, 339 U.S. 306, 319.)

A long line of California cases has held in tax sale situations "publication of notice is all the 'due process' notice to which the delinquent taxpayer is entitled, and that '[a]s far as the mailing of additional notices of sale prior to the sales to and from the State, or the mailing of any additional notices at all is concerned, such notices could have been done away with or not required by the legislature in the first instance without doing violence to due process.' (182 P.2d 280, 283.)" (McMaster v. City of Santa Rosa, supra, 27 Cal. App. 3d at p. 605; see also Merchants' Trust Co. v. Wright (1911) 161 Cal. 149, 150; Bank of Lemoore v. Fulgham (1907) 151 Cal. 234, 239-240; Philbrick v. Huff, supra, 60 Cal. App. 3d at p. 642; Westinghouse Elec. Corp. v. County of Los Angeles (1974) 42 Cal. App. 3d 32, 42-44; Litchfield v. County of Marin (1955) 130 Cal. App.

2d 806, 816-816.) The theory underlying this conclusion is apparently that annually assessed ad valorem property taxes are well known to the property owner and therefore he has an obligation to be on alert to protect his rights against delinquency concerning those taxes. (Philbrick v. Huff, supra, 60 Cal.App.3d at p. 647.) This theoretical basis is consistent with the above quoted portions of Mullane. The very nature of annually assessed ad valorem property taxes is such that a property owner is already on notice that he should be receiving a bill every year in the mail and that if he does not the taxes will become delinquent and the property might be sold to the state to satisfy them. This sharply contrasts with the situation in Mullane in which the known beneficiaries, particularly those who lived outside New York, had no reason to be alert to protect their rights with regard to the trust fund there involved. (Sears v. County of Calaveras (1955) 45 Cal. 2d 518, 521-522.)

Appellant places reliance upon this court's recent decision in Johnson v. Alma Investment Co. (1975) 47 Cal.App.3d 155. Johnson, however, is distinguishable from the case at bar because Johnson involved an irregular assessment by a local water storage district. Unlike with the annually assessed ad valorem property tax, there was no reason for the property owners in Johnson to be on guard to protect their interests. Consequently, this court held due process was not satisfied in the water storage district's failure to utilize the address of the property owner which was readily available from both the tax assessor and tax collector to provide direct mail notice.

Footnote 3, page 160, of the Johnson opinion implicitly supports the very distinction here made between the Johnson situation and the case at bar. Likewise, in the recent case of Philbrick v. Huff, supra, 60 Cal. App. 3d 633, the Court of Appeal of the First Appellate District employed the same distinction between annually assessed ad valorem propterty taxes and special water district assessments. (Id. at p. 646.) Thus, the court in Philbrick concluded direct mail notice was not required under the same tax sale procedures that are involved herein to satisfy due process and that publication of notice was all that was required.

Thus, consistent with the foregoing authority, the conclusion is inescapable that in the instant case appellant has been provided the entirety of his due process rights by the uncontroverted evidence that respondents gave notice by publication prescribed in the tax sale statutes.

Appellant argues that since the last sentence of sections 3365 and 3701 was added in 1971 and the default and sale to the state of Lot 170 took place before that date, these sections could not be legally applied to Lot 170. However, since these sections were not invoked by the taxing authority until 1973, the amendments were properly applied to this case. Moreover, both the duty to make a reasonable effort to locate the address of the last assessee and the relief from that duty were placed in the sections by amendment at the same time. The situation is not one where a right has been created by legislation and then sometime later the procedure for obtaining

relief with regard to that right is eliminated. Properly viewed, the Legislature is fully within its power to set forth the right or duty in a statute and limit it at the same time in any way it chooses so long as it is not under a constitutional compulsion to leave that right unrestricted. There is no such constitutional compulsion in this case.

Appellant further urges that the issue of fraud is a question of fact. (Civ. Code, § 1574.) It is first to be noted that the curative effect of sections 3518 and 3711 can be avoided only by actual fraud, constructive fraud being expressly eliminated as a basis for relief by those sections.

While some of the allegations of appellant's complaint may be construed as an effort to plead actual fraud, appellant cannot use his own pleading to oppose a motion for summary judgment. (Code Civ. Proc., § 437c; Joslin v. Marin Mun. Water Dist. (1967) 67 Cal.2d 132, 148; Dugar v. Happy Tiger Records, Inc. (1974) 41 Cal.App. 3d 811, 818.) There is not a hint or suggestion of actual fraud in the other papers submitted in opposition to the motion. Moreover, respondents in their memorandum of points and authorities filed in support of their motion for summary judgment in the trial court indicated appellant conceded at the pretrial conference that there were insufficient facts to establish actual fraud. In his response to the motion for summary judgment, appellant did not deny this concession and solely argued constructive fraud. Likewise, he expressly argued constructive fraud only in his opening brief in this court. From this it must

be concluded appellant waived the contention, now weakly argued, that there is a triable issue of fact with regard to actual fraud.

Lastly, appellant seeks to recover the excess of the sales price of the property over the tax liability. However, by allowing taxes to become delinquent for a period of over five years and the property having been deeded to the state, appellant forfeited any property interest in the property or the procees from the sale. In exercising its sovereign power as owner of the property free and clear of any interest in the taxpayer, the state may sell the property for whatever amount it will bring on the open market to the highest bidder, even if that amount exceeds the amount of the tax liability, or sell the entirety of the property where the sale of only a parcel of it would satisfy the tax obligations. Since the state was the absolute owner of the property there was no obligation to pay appellant the excess of the sales price over the tax liability. (Mercury Herald Co. v. Moore, supra, 22 Cal. 2d 269, 272; South San Joaquin Irr. Dist. v. Neumiller (1935) 2 Cal. 2d 485, 489; Jordan v. Beale (1916) 172 Cal. 226, 228; Furrey v. Lautz (1912) 162 Cal. 397, 399; Merchants' Trust Co. v. Wright, supra, 161 Cal. at p. 150; Chapman v. Zobelein (1912) 19 Cal. App. 132, 134 (affd. at 237 U.S. 135).)

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

(Brown)
P.J.

WE CONCUR:

(Thompson)
J.*

(Goldstein)
J.*

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* Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

FEB 3 1977

I have this day filed Order

HEARING DEN

In re: 5 Civ. *No.* 2903

Chesney

vs.

Gresham and Hudgins

Respectfully,

G. E. BISHEL
Clerk

42336-077 8-76 3M OBP

APPENDIX B

AMENDMENT XIV OF THE

CONSTITUTION OF THE UNITED STATES

". . .No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

APPENDIX C

CALIFORNIA REVENUE AND TAXATION CODE

Section 2609. (Notice of due and delinquency dates, penalties, etc.)

On or before the day when taxes are payable the tax collector shall publish a notice specifying:

(a) The dates when taxes on the secured roll will be due.

(b) The times when these taxes will be delinquent.

(c) The penalties and costs for delinquency.

(d) That all taxes may be paid when the first installment is due.

(e) The times and places at which payment of taxes may be made.

Section 2610: (Notice of due and delinquency dates, penalties, etc; publication; posting)

The notice shall be published once a week for two weeks in a newspaper, if there is one published in the county, or, if none, by posting it in three public places in each township.

Section 2610.5 (County tax bill; annual mailing; failure to receive bill)

On or before November 1 each year, the tax collector of every county shall mail a county tax bill or copy thereof to each assessee or fee owner of property on the secured roll. This requirement need not be met where the computation of taxes results in a zero amount. The failure to receive a tax bill does not relieve the fee owner from the liability to pay taxes owed, nor does it relieve the imposition of penalties imposed by this code.

Section 2611. (Tax bills; notice of penalties)

A notice shall be printed on all tax bills specifying that if taxes are unpaid, it will be necessary as provided by law to pay:

(a) Delinquency penalties.

(b) Costs.

(c) Redemption penalties.

(D) Redemption fee.

Section 2612. (Tax bills; tax sold separately; notice of sale)

On the tax bill for tax-sold property shall appear in writing the fact that it has been sold for delinquent taxes. In the alternative the tax bill may contain language such as "property sold

to state for unpaid prior year taxes," "sold to state due to delinquent prior year taxes," or any other language which would indicate the fact the property has been sold to the state and there are delinquent prior year taxes.

Section 3351. (Notice of intention of collector to sell; publication)

Annually, on or before June 8th, the tax collector shall publish a notice of his intent to sell to the state the real property, except tax-sold property and possessory interests, the taxes, assessments, penalties, and costs on which will have not been fully paid at the time set for the sale.

Section 3365. (Mailing copy of publication or notice to last assessee)

After the first publication of the notice of intent to deed to the state and not less than 21 nor more than 35 days before the date of deeding, when tax-sold property is to be deeded, the tax collector shall send by registered mail to the last assessee of the tax-sold property at his last known address either a copy of the publication or a notice of intent to deed the property to the state. The tax collector shall make a reasonable effort to ascertain the address of the last assessee of the tax-sold property, including, but not limited to, an examination of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last

equalized rool, an examination of the most recent telephone books in the county in which the tax-sold property is located, and an examination of the telephone book covering the area of the last known address of the last assessee.

The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the deed to the state.

Section 3701. (Authorization by Controller; notice to last assessee; address)

After receiving the written authorization of the Controller and not less than 21 nor more than 28 days, before the proposed sale, the tax collector shall send a notice by registered mail of the intended sale to the last assessee of each portion of the property at his last known address. The tax collector shall make a reasonable effort to ascertain the address of the last assessee of the tax-deeded property, including, but not limited to, an examination of the assessment of this property on the rolls beginning with the year of delinquency to and including that of the last equalized roll.

The failure of the tax collector to make a reasonable effort to ascertain the address of the last assessee as required by this section shall not affect the validity of the sale.

Section 3807. (Redemption right, termination; interest conveyed)

If not previously terminated, all rights to redeem the property from sale to the State are terminated on the date upon which the application for the deed is received or on the date upon which the payment of the purchase price is received in compliance with the terms of the agreement. The deed conveys to the purchaser all the State's interest in the property.